1966

Some Bases for Remittitur in Personal Injury Cases

Robert Saxer

Some Bases for Remittitur in Personal Injury Cases

*Robert Saxer**

IN REVIEWING AN AWARD by a jury the court must consider various factors before it can determine whether the award is so excessive that remittitur should be granted or a new trial ordered. Remittitur is justified when the award is based on computation errors, oversight or consideration of an improper element, or when, in view of the evidence, the judgment is excessive enough to indicate prejudice, passion, partiality or corruption on the part of the jury.[1]

The Ohio Revised Code, Section 2321.17, states, typically of such statutes:

> A final order, judgment or decree shall be vacated and a new trial granted by the trial court on the application of a party aggrieved [sub. D] where the damages are excessive and appear to have been given under the influence of passion or prejudice.

This rule gives the court no alternative but to set aside the verdict and grant a new trial when passion or prejudice is involved.[2]

There are no absolute rules for deciding whether damages are excessive and the court must determine from the circumstances of the case whether the verdict is the result of bias, prejudice or gross overestimation.[3] However, when the amount awarded is sustained by the evidence and within the range of just compensation for such difficult to determine items as personal injuries and pain and suffering, the verdict rendered should not be disturbed.[4] The court should consider the nature and extent of injuries, future discomfort and suffering, expenses and loss of earnings already incurred, and future loss of earnings and expenses. The plaintiff's age, life expectancy, and trade or profession should count in evaluating the verdict.[5] The *court should*

---

* B.S., Kent State Univ.; Third-year student at Cleveland-Marshall Law School of Baldwin-Wallace College.

1 25A C. J. S., Damages, Sec. 196 (1966); Oleck, Damages to Persons & Property, Sec. 152 (1961 rev. ed.); Oleck, Cases on Damages, c. 8 (1962).

2 40 Ohio Jur. 2d 576 (1959).

3 *Op. cit. supra* note 1.

4 Weeks v. Hyatt, 346 Mich. 479, 78 N. W. 2d 260 (1956); *op. cit. supra* note 1.

5 16 Ohio Jur. 2d 337 (1955).

not substitute its judgment for the jury's unless the verdict lacks the support of evidence or is clearly excessive.[6] The court is not limited to considering the above factors but may also consider mortification and embarrassment, "phantom" pains,[7] and loss of consortium.[8]

The order of the court requiring a remittitur within a specified period is not conclusively binding on the plaintiff, as he may elect to go through another trial rather than accept the reduced amount.[9] The mere suggestion that the plaintiff accept a reduced verdict to avoid further litigation is not a finding that the verdict was excessive nor does it indicate that the judge abused his discretion by not demanding a remittitur.[10]

Generally, where passion and prejudice are involved in the verdict, a new trial must be granted because there is no basis for remittitur when the defendant did not have a fair trial. However, where the trial court judge does not indicate the basis for the remittitur, the appeals court must decide from the trial record whether there were grounds to support a remititur. Where none are shown, the remittitur will be denied and the jury verdict reinstated.[11]

The court should not insert its judgment of the evidence in place of the jury verdict. In an action for a whiplash injury a judge ordered a remittitur of $10,000 without stating justification. The Supreme Court of Wisconsin said that the evidence supported the entire award. A trial judge's opinion carries great weight, because he sees the entire proceedings, but he still must state the basis of his decision or he has abused his discretion when the trial record does not openly support his action.[12]

The recent trend in awarding remittitur has been to allow a reasonable award and not the lowest possible amount.[13]

The best method of understanding how remittitur is determined is to analyze pertinent cases and see what principles of damages are emphasized.

---

[6] Kazdin v. Cooley, 23 N. Y. S. 2d 484 (1940).

[7] Hubbard v. The Long Island Railroad Co., 152 F. Supp. 1 (E. D. N. Y. 1957); 21 N. A. C. C. A. L. J. 256 (1958).

[8] Gleason v. Cunningham, 316 Ill. App. 286, 44 N. E. 2d 940 (1942).

[9] Elliott v. Sherman, 147 Me. 317, 87 A. 2d 504 (1952).

[10] Rea v. Simowitz, 226 No. Car. 379, 38 S. E. 2d 194 (1946).

[11] Majewski v. Nowicki, 364 Mich. 698, 111 N. W. 2d 887 (1961).

[12] Millay v. Milwaukee Automobile Mutual Insurance Co., 19 Wis. 2d 330, 120 N. W. 2d 103 (1963).

[13] Powers v. Allstate Ins. Co., 10 Wis. 2d 78, 102 N. W. 2d 393 (1960).

A 70-year old woman suffered serious injuries in a train accident which left her an invalid for the rest of her life. She had $2,700 in medical bills and a future operation would cost $1,200. A housemaid would charge $8 a day; the plaintiff had a life expectancy of 12 years; she had no earning power; her pain was severe. The jury granted her $37,900 for past and future expenses and $38,600 for pain and suffering. The Supreme Court of Oklahoma felt that the size of the award indicated the jury was in part motivated by passion and prejudice, and ordered a remittitur of $26,500. Oklahoma is one of the few states where passion and prejudice do not necessarily require the grant of a new trial.[14]

In an auto accident involving a whiplash injury, the jury awarded the plaintiff-housewife $10,000. The plaintiff had $250 in medical bills, spent 2½ months in bed and suffered pain for 7 months. The trial court ordered a remittitur of $4,000 and the defendant appealed on the grounds that the award was excessive and the result of passion and prejudice. The appeals court held there was a proper basis for the award and that the verdict must be greatly excessive before it can be traced to passion and prejudice. A $4,000 remittitur does not show that passion and prejudice were involved.[15]

In another injury case the appeals court felt that a $30,000 remittitur was not sufficient correction of the verdict where the actions of the plaintiff on the witness stand inflamed the jury. A new trial was ordered.[16]

Injuries to minors generally involve higher awards due to their longer life expectancy, but remittiturs are frequently involved. In one case a child received a non-permanent back injury in a railroad accident, and the court ordered a $5,000 diminution of the $12,500 award, based on comparison with similar awards given in the past.[17] In another railroad case a mentally retarded, epileptic child lost both legs and was awarded $225,000; the court ordered a $60,000 reduction. The Supreme Court of Missouri affirmed the remittitur and increased it to $90,000. The reason for lowering the award was comparison of the award with other cases which involved different age groups

---

[14] St. Louis-San Francisco Railway Co. v. Fox, 359 P. 2d 710 (Okl. 1961).

[15] Gleason v. Cunningham, 316 Ill. App. 286, 44 N. E. 2d 940 (1942).

[16] Stephens v. Chicago Transit Authority, 28 Ill. App. 2d 229, 171 N. E. 2d 229 (1960).

[17] Williams v. Illinois Central R. R. Co., 360 Mo. 501, 229 S. W. 2d 1 (1950).

and work capabilities.[18] A similar case occurred one year later involving a 16-year old child of above average health and intelligence, who became a quadraplegic as the result of a train accident. The previous case was cited as a basis for the remittitur of $50,000 of a $270,000 award. The court held the plaintiff entitled to a higher award than in the previous case, because his potential earnings would be larger and the pain and suffering were more acutely realized by the more intelligent and healthier child.[19]

In an earlier case a woman had broken her ribs, legs and nose. She suffered severe pain and had to use crutches for 13 months after the accident. The trial court granted a remittitur of $10,000 and the defendant appealed, citing numerous similar cases with lower awards. The appeals court reviewed the cases and found that the particular circumstances involved justified a $10,000 remittitur.[20]

The importance of loss of future earnings is indicated in the following case. The plaintiff suffered from low back pain and had several scalp scars which were covered by hair. The trial judge ordered a remittitur of $3,700 from an $8,000 judgment to a plaintiff who had obtained a better job after the accident, got married, and showed no anxiety or injury at the trial.[21]

A remittitur of $13,000 from a $20,000 award was granted in an Ohio case; here the court stated that passion and prejudice were not involved although ⅔ of the award was unreasonable. The plaintiff was a seriously ill man who suffered from a severe heart and liver condition. He was cut on the leg through the negligence of the defendant, and the resulting infection hastened his death. Medical testimony indicated that he had a life expectancy of 2 years when he died; he earned $60 a week when able to work. The court held that the jury obviously believed the plaintiff would have lived longer, and this did not indicate passion or prejudice but only an error on the evidence.[22]

---

[18] Newman v. St. Louis-San Francisco R. R. Co., 369 S. W. 2d 583 (Mo. 1963).

[19] Coffman v. St. Louis-San Francisco R. R. Co., 378 S. W. 2d 583 (Mo. 1964).

[20] Easterly v. American Institute of Steel Construction, 340 Mo. 604, 162 S. W. 2d 825 (1942).

[21] Lucas v. State Farm Mutual Auto Insurance Co., 17 Wis. 2d 568, 117 N. W. 2d 660 (1962).

[22] Larrissey v. Norwalk Truck Line Inc., 155 Ohio St. 207, 44 Ohio Op. 238, 98 N. E. 2d 419 (1951).

In a Connecticut case, the Supreme Court of Errors stated that future pain and suffering damages must be based on probable suffering and not upon the conjecture that there was a 50% chance of future pain and suffering. The court ordered a $2,000 return of a $5,800 reward.[23]

Another court ordered a remittitur of $9,280 of a $15,280 verdict based on the evidence from the trial. The appeals court stated that the trial court would be reversed only where an abuse of discretion was involved. The trial court must review the evidence in terms most favorable to the plaintiff.[24] Reasonable damages fall anywhere between an unreasonable low or high, and the $6000 award comes close to falling below the reasonable minimum. This counters the trend the courts have started towards allowing a reasonably high award in remittitur cases. This remittitur was allowed reluctantly.[25]

In an award for injuries to two children, the trial court granted a remittitur on awards to both children. The appeals court declared that the reduction from $1,500 to $1,000 for the broken leg of a 2-year old child was an abuse of discretion since the amount awarded did not show excessiveness. However, the reduction from $2,000 to $1,000 for a 3-year old child for operable scars around the mouth was reasonable, and the amount was substantial.[26] In this case $500 was the difference between reasonable and excessive awards.

Damages were itemized in the following case involving whiplash: past medical expenses—$200; loss of wages—$82; present pain and suffering—$7,500; future medical expenses and pain and suffering—$5,000. The trial judge determined that no wages were lost, prior medical costs were $125, and past and future suffering and medical expenses would be $7,000. Injuries to a hand and leg disappeared after six months, and the plaintiff had occasional headaches and temporary pain on extreme exertion. The Supreme Court of Wisconsin stated that the trial judge did not abuse his discretion by lowering the award even though passion, prejudice or judicial error were not involved.[27]

---

[23] Davis v. Gambardella and Son Cheese Corp., 147 Conn. 365, 161 A. 2d 583 (1960).

[24] Kincannon v. National Indemnity Co., 5 Wis. 2d 231, 92 N. W. 2d 884 (1958).

[25] Boodry v. Byrne, 22 Wis. 2d 585, 126 N. W. 2d 503 (1964).

[26] Makowski v. Ehlenbach, 11 Wis. 2d 38, 103 N. W. 2d 907 (1960).

[27] Richie v. Badger State Mutual Gas Co., 22 Wis. 2d 133, 125 N. W. 2d 381 (1963).

In a rat poison case the plaintiff was hospitalized 20 days, spent an additional 2 weeks at home, missed several months of work, and 2 years later was experiencing some pain and suffering. An award of $20,000 shocked the conscience of the court but a remittitur of $10,000 removed the shock.[28]

In a libel action the court ordered a remittitur of $50,000 on a $100,000 award because the libel was distributed in only 50 or 60 written copies, and the jury was motivated by patriotic passion and prejudice.[29]

Several cases involve points limited in scope. Where the plaintiff receives damages in excess of the ad damnum of the writ, he may avoid a retrial by repaying the excess within 30 days.[30] An award is not too excessive because it does not consider any pension awarded in which the defendant had no interest.[31]

In the following cases the awards were *not* considered excessive, and a review of them will help to give a balanced view of remittitur.

A plaintiff-wife was injured when a truck hit the restaurant in which she was working with her husband. She was thrown against a piece of equipment, thereby injuring her leg. Pain developed in her leg and neck; a blood clot was discovered in her leg; she was ordered not to work. Subsequently, a blood clot was discovered in her breast. She could not work for 6 months, and she was suffering leg pains 3½ years after the accident. Her husband sued for medical expenses of $1,172.20, loss of wages, wages paid for a substitute employee, and loss of consortium. The wife was awarded $6,000 and the husband $3,000. The trial court ordered a remittitur of $3,000 and $1,000 respectively. The court based the remittitur on an alleged reference by the plaintiff to an "insurance doctor." The judge also stated that the injuries were slight. The appeals court stated that the trial court had abused its discretion in ordering a remittitur since the evidence made such an award well within reasonable limits.[32]

A 23-year old employee lost both legs in an accident, and an award of $226,000 was not so flagrantly excessive as to shock the

---

[28] Luthringer v. Moore, 31 Cal. 2d 489, 190 P. 2d 1 (1948).

[29] Foerster v. Ridder, 57 N. Y. S. 2d 668 (1945).

[30] Elliott v. Sherman, 147 Me. 317, 87 A. 2d 504 (1952).

[31] Arizona Cotton Oil Co. v. Thompson, 30 Ariz. 204, 245 P. 673 (1926).

[32] Stevens v. Edward C. Levy Co., 376 Mich. 1, 135 N. W. 2d 414 (1965).

conscience of the court, considering the loss and suffering involved. Other cases cited offered meager help in determining if the present award was excessive because of differences in circumstances and changes in the value of money.[33]

A motorist was awarded $23,000 for a concussion, broken ribs, partial loss of hearing, and a fractured skull which required the insertion of a steel plate which left an obvious scar. This amount is not so grossly excessive as to require a remittitur.[34]

A plaintiff was struck by a defendant with a shotgun and suffered a cut elbow, bruised breast and mental suffering. The jury awarded $2,000 in damages. The appeals court stated that it would not have made such a high award but the award was not obviously excessive or produced by passion or prejudice.[35]

A 44-year old physical education instructor was awarded $30,000 for a mild, permanent paralysis which affected his gait. He had $2,500 in expenses before the trial. The court felt that no passion or prejudice was involved in the verdict, and awarding damages is primarily the jury's function.[36]

In another case the plaintiff lost his spleen due to a fall; he had actual expenses of $1,400 and was awarded $18,000. The court stated that the plaintiff lost a vital organ and for that reason the verdict was not excessive.[37]

An award of $75,000 was granted to a child for loss of vision in one eye, facial damages, a concussion, and a broken clavicle, all suffered in an auto accident; this award was not excessive. Life expectancy is a valid consideration in awarding damages, and also changing economic conditions have a bearing on an award of damages.[38]

A $20,000 verdict to a policeman who suffered extensive injury to his knee which prevented him from returning to work for 2 years was not excessive. The verdict did not shock the conscience of the court.[39]

A plaintiff was injured in a fall from a sidewalk and was awarded $15,000 in damages. There was conflicting evidence of

---

[33] Hubbard v. Long Island, *supra* note 7.

[34] Wright v. Covey, 233 Ark. 798, 349 S. W. 2d 344 (1961).

[35] Bowser v. Bembo, 34 Ohio Law Abst. 253, 36 N. E. 2d 998 (1941).

[36] Liby v. Town Club, 5 Ill. App. 2d 559, 126 N. E. 2d 153 (1955).

[37] Kleren v. Bowman, 15 Ill. App. 2d 148, 145 N. E. 2d 810 (1957).

[38] Lopez v. Price, 145 Conn. 560, 145 A. 2d 127 (1958).

[39] McKay v. Hargis, 351 Mich. 409, 88 N. W. 2d 456 (1958).

her condition. The court stated that conflicts in evidence belong to the jury to resolve. The amount of the verdict should not be lowered because there were conflicts in evidence.[40]

For older plaintiffs, age is an important factor in determining the basis for remittitur. A $2,500 award to a 77-year old man with a 25% limp and insomnia was not excessive.[41] An award of $6,500 for an injury to the shoulder and arm of a 60-year old woman was not excessive, but a $25,000 award to a permanently disabled 86-year old man without income was excessive by $16,500.[42]

Conclusion

From the foregoing cases it is evident that the courts exercise wide discretion in applying the principles of remittitur. The trial court can apply remittitur with greater assurance than the appeals court and will be reversed only when an abuse of discretion is shown. Many courts use comparative awards to determine excessiveness, while others pay little heed to prior awards. Passion and prejudice require a new trial in some jurisdictions, while in others it is a basis for remittitur or a new trial. Remittitur is based on equitable principles and aims at avoiding excesses in jury verdicts without having recourse to new trials.

The courts are continually applying remittitur because only the total damages are listed in many awards and the total sometimes clearly appears to be excessive. If in all cases the award would show the individual dollar amount of each damage, the judge and appeals court could study each item and pinpoint the obvious errors and the exact amount awarded for unliquidated damages. If the court then found passion and prejudice only with regard to pain and suffering, that issue would have to be retried, or remittitur accepted on that item. A second trial would deal only with the issue not satisfactorily determined in the initial trial. Issues not really in dispute or already settled would be eliminated from the new trial, and the jury would have to deal with only one or two items of damage. By using a breakdown of the damages awarded, future cases would have a better yardstick for comparing awards and determining what is exces-

---

[40] Dodson v. New England Trust Co., 78 Ohio App. 503, 71 N. E. 2d 503 (1946).

[41] Oberlin v. Pyle, 114 Ind. App. 21, 49 N. E. 2d 970 (1943).

[42] Olson v. Siordia, 25 Wis. 2d 274, 130 N. W. 2d 827 (1964).

sive. A court would not have to waste time in searching for nearly identical cases to see if all items agreed. Similar cases would be studied only in regard to the items of pain and suffering and loss of earning power, which are the really difficult damages to evaluate.

Extensive use of experts on income planning, to explain to juries the cost of maintaining an income level over a fixed number of years, should be encouraged. Sometimes it might be more equitable to all to have a referee assess the value to put on particular facts determined by the jury, except for the value for pain and suffering, which cannot be judged by any existing standards. Thus the jury would be guided in its evaluation of the "auditor's findings" in the case, subject to the equitable review of the trial judge and appeals court.

Courts are using remittitur more and more frequently. This indicates that the growing complexity of fixing damages requires a change in emphasis on the duty of the jury as determiners of fact on one hand, and as awarders of damages on the other. We need the jury to evaluate the facts, but we often need expert advice in determining the precise amount of damages.